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Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY MORGAN, Defendant and Appellant.	D052212 (Super. Ct. No. SCE 272637)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed in part and reversed in part with directions.

Mark Anthony Morgan entered negotiated guilty pleas to two counts of committing a lewd act on a child (Pen. Code, § 288, subd. (a); all statutory references are to the Penal Code) and admitted he had substantial sexual conduct with a child under 14 years of age (§ 1203.066, subd. (a)(8)) with respect to each count. Under the plea bargain, the prosecution agreed to dismiss four other counts of committing a lewd act on

a child and two counts of committing a forcible lewd act on a child (§ 288, subd. (b)(1)). The trial court sentenced Morgan to a 10-year prison term; the eight-year upper term for the first count plus two years (one-third the middle term) for the second count. As circumstances in aggravation, the court noted the crime involved a high degree of callousness, the victim was vulnerable and Morgan had taken advantage of a position of trust to commit the offense.

FACTS

Between August 1, 2005 and July 1, 2007, Morgan molested his stepdaughter numerous times in the home and in his truck. When the molestations began, the stepdaughter was six years old. Morgan knew that the stepdaughter previously had been molested by her father.

When confronted by his wife, Morgan admitted the molestations. Morgan pleaded guilty before the preliminary hearing. On the change of plea form, Morgan stated he had "willfully and lewdly commit[ted] a lewd and lascivious act upon the body of [his stepdaughter], a child under the age of 14 years, with the intent of arousing, appealing to, and gratifying the lust, passions, and serious desires of [himself] and the child; (to wit, hand to vagina), and it is considered substantial sexual conduct."

DISCUSSION

Appointed appellate counsel filed a brief setting forth evidence in the superior court. Counsel did not present any argument for reversal, but asked that this court review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible, but not arguable,

issues: (1) whether Morgan was properly advised of his constitutional rights and the consequences of pleading guilty, and whether he voluntarily waived his rights; and (2) whether the trial court violated the principles set forth in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) by imposing the upper term for count one without a jury finding of aggravating circumstances to support the upper term.

We also granted Morgan permission to file a brief on his own behalf. He has not responded.

After review of the record, we requested the parties submit letter briefs addressing the Supreme Court's recent decision in *People v. French* (2008) 43 Cal.4th 36 (*French*). They have done so.

In *French*, our Supreme Court considered a *Cunningham* challenge in a factually analogous context. The defendant pleaded no contest to six counts of violating section 288, subdivision (a), and was sentenced to the upper term on one count based on the aggravating factor that he abused a position of trust. The Court of Appeal affirmed the sentence, but the high court reversed and remanded for resentencing. (*French*, *supra*, 43 Cal.4th at p. 55.) The high court held that *Cunningham* applies to cases in which the defendant pleaded guilty or no contest and concluded that a waiver of the right to jury trial on the substantive offenses does not constitute a waiver of the right to a jury trial on any aggravating circumstances. Also, by entering into a plea agreement that includes the upper term as the maximum sentence, a defendant does not implicitly admit that his conduct could support that term. A defendant's stipulation to a factual basis for the plea constitutes an admission to the elements of the charged offenses only and not to any

additional aggravating circumstances. Therefore, imposition of the aggravated term based solely on an offense-related factor that was not admitted or found true by a jury infringed upon the defendant's jury trial right. (*Id*. at pp. 48-52.) We note that none of the aggravating factors mentioned by the trial judge come within the exceptions set forth in *Blakely v. Washington* (2004) 542 U.S. 296, 301, 303 and *Cunningham*, *supra*, 549 U.S. 270, such as a defendant's criminal history, and thus cannot be used under the revised section 1170, subdivision (b) (amended by Stats. 2007, ch. 3, § 2).

The Attorney General argues that Morgan forfeited his right to relief under *French*, *supra*, 43 Cal.4th 36, because his written guilty plea form included a "*Blakely* Waiver," which stated: ". . . I agree that the sentencing judge may determine the existence or non-existence of any aggravating facts which may be used to increase my sentence on any count or allegation above the middle term. . . ." Morgan placed his initials next to this sentence. We are not persuaded by this argument.

In *French*, *supra*, 43 Cal.4th at page 46, our Supreme Court noted: "Our state Constitution requires that waiver of jury trial in a criminal case be made 'by the consent of both parties expressed in open court by the defendant and the defendant's counsel.' " Furthermore, because the federal Constitutional right to a jury trial on aggravating circumstances is now recognized, it follows that an express waiver of that right be required before the court can decide such questions. (*Id*. at pp. 46-47.)

The *Blakely* waiver that Morgan initialed did not refer to the right to a trial by jury on aggravating circumstances. Nor was this subject brought up during the change of plea hearing. Given the state of flux of the law in this area in recent years, we conclude that

Morgan did not forfeit his right to challenge the upper term sentence by initialing the box next to the *Blakely* waiver on his change of plea form. (See *French*, 43 Cal.4th at p.48, fn. 6.) Morgan did not make an express waiver of his right to a jury trial on aggravating circumstances as envisioned by the Supreme Court in *French*.

Is such an error prejudicial? Failure to submit an aggravating circumstance to the jury requires reversal if the reviewing court cannot determine the error was harmless beyond a reasonable doubt. (*French*, *supra*, 43 Cal.4th at pp. 52-53.) "[T]hat test requires us to determine 'whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence.' " (*Id*. at p. 53, quoting *People v. Sandoval* (2007) 41 Cal.4th 825, 838.) The *French* court noted that in this context the test is particularly problematic: "When a defendant pleads guilty or no contest, a prejudice assessment is even more problematic, because the record generally does not contain a full presentation of evidence concerning the circumstances of the offense." (*French, supra*, 43 Cal.4th at p. 54.)

We have such a situation here. Because Morgan pleaded guilty without a preliminary hearing, the record does not reflect how witnesses might have testified if there had been a trial. The recitation of facts in the probation report was based on multiple layers of hearsay. The child's mother and other relatives who spoke at sentencing did not testify under oath and were not subject to cross-examination. Consequently, we cannot say on this limited record that the Sixth Amendment error was harmless beyond a reasonable doubt.

DISPOSITION

The sentence is vacated and the case is remanded to the superior court solely for resentencing in accordance with this opinion. After resentencing, the clerk of the superior court is directed to prepare an amended abstract of judgment that includes the new sentence and to transmit the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other aspects, the judgment is affirmed.

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MCINTYRE, J.

WE CONCUR:

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BENKE, Acting P. J.

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HALLER, J.